IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1225

* * *

DOUGLAS SEIDEL,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

BRIEF IN OPPOSITION

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

* * *

JOHN L. HILL
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SUBJECT INDEX

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

* * *

The Petitioner, DOUGLAS SEIDEL, prays for a Writ of Certiorari issue to review the opinion and judgment of the Criminal Court of Appeals of the State of Texas rendered in these proceedings on November 2, 1977.

OPINIONS BELOW

The opinion of the Criminal Court of Appeals, as yet unreported appears at Appendix "A", *infra*, Page . No formal opinion was rendered by the District Court of Comal County, Texas.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Texas was entered on November 2, 1977. See Appendix "A", Page , *infra*. A timely petition for rehearing was denied on December 7, 1977, and this

petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

Petitioner was indicted for and found guilty of Possession of a Controlled Substance, Lysergic Acid Diethylamide. Punishment was set by the Court at five (5) years in the Texas Department of Corrections, which sentence was probated for five (5) years. Petitioner waived formal sentencing and filed a Motion for New Trial and Motion in Arrest of Judgment. The Court granted the Motion in Arrest of Judgment and sentenced the Petitioner to five (5) years probated. The Court denied the Motion for New Trial whereupon the Petitioner gave notice of appeal.

Petitioner was represented at his State Court Trial by counsel of his choice, Mr. Bennie Bock, Mrs. Sue Funk, and Larry A. Catlin and is represented by Mr. Bennie Bock and Mr. Gerald H. Goldstein.

Evidence adduced at Trial on the Merits showed that Steven Hollingshead, a Detective with the New Braunfels Police Department, was on regular patrol as a detective on January 6, 1974, and noticed unusual activity in front of a lounge called the "Blue Room". Hollingshead knew that in the past several arrests relating to narcotics offenses had been made at the Blue Room and that the establishment had a reputation among law enforcement officers for being a place where there was traffic in drugs. Hollingshead maintained a surveillance with binoculars for a few minutes and came to the conclusion that something was being exchanged for money by the people in front of the Blue Room. He saw people making furtive gestures and appearing to get something from the Latin-American male who received money from them. Hollingshead,

who was not in uniform, called for help and then walked toward the group in front of the Blue Room. As Hollingshead came toward the group he noticed the strong smell of marijuana. The Petitioner was watching a police sergeant who was also approaching the group. Hollingshead identified himself to the Petitioner as a police officer. The Petitioner called the officer a "son of a bitch", rapidly placed something in his mouth, attempted to swallow it, and jumped back toward the building. Hollingshead grabbed the Petitioner by the throat and with the help of Sergeant Domingo Herrera Hollingshead took from the Petitioner's mouth a small piece of paper which had a blue dot on it. Hollingshead placed his initials and the date on the small piece of paper and later placed it in an envelope which he marked, dated, and sealed.

The evidence was later identified by Mr. Glen Harrison, a chemist employed by the Texas Department of Public Safety as being Lysergic Acid Diethylamide.

Officer Hollingshead did have to choke the Petitioner with one hand to stop the passage of whatever he had swallowed and retrieve the substance. The officer did not know what to expect upon extraction of the substance. The struggle was momentary.

ARGUMENT AND AUTHORITIES

1. The Search and Seizure was Reasonable Under the Decision of Espinoza v. United States and Does Not Conflict with the Principals Enunciated in this Court's Ruling in Rochin v. The People of California.

This Honorable Court has already decided the issue as to the reasonableness of this type of search. Espinoza v. United States 278 F.2d 802 (CA 5 1960), 364 U.S. 827 (Cert. Denied). Based on an informer's tip, officers

established that Espinoza would have narcotics on his person. Upon approaching him, he took a small package and attempted to swallow it whereupon the officers grabbed him by the throat, choked him, and retrieved the package by placing pressure against his jaw and nose. Such force has been held to be reasonable police action to prevent destruction of evidence if it was not undue force or brutality. United States v. Harrison 432 F. 2d 1328 (CA DC 1970).

When the officer observed the Petitioner attempting to swallow some type of substance, he grabbed the Petitioner by the throat, choked him, and retrieved said substance which was later identified as lysergic acid diethylamide. The struggle was relatively short and no unnecessary force was utilized.

2. The Principles Enunciated in the Court's Rulings in Sibron and Terry are Not in Conflict With the Decision Below.

In order for a warrantless arrest or search to be justified the existence of probable cause must be shown at the time of the arrest. It has been established that furtive movements or other suspicious circumstances relating the suspect to the evidence of crime may constitute probable cause. Sibron v. New York, 392 U.S. 40, 20 L.Ed. 2d 917, 88 S. Ct. 1889; Wilson v. State of Texas 551 S. W. 2d 531 (Tex. Crim App. 1974). The mere fact, however, of a furtive movement or gesture standing alone is insufficient, Wilson v. State, supra; Brown v. State of Texas, 481 S. W. 2d 106 (Tex. Crim. App. 1972), as the law requires more to establish probable cause for a search or arrest. People v. Superior Ct. of Yolo County, 3 Cal. 3rd 807, 91 Cal. Rptr. 729, 478 P. 2d 449; Wilson v. State, supra.

Probable cause for a search will exist when the facts and circumstances known to the officer would lead a

man of reasonable caution and prudence to believe that the search will produce evidence pertaining to a crime or that a particular person has committed or is committing a crime. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 20 L.Ed. 2d 538, 88 S. Ct. 1472; Brinegar v. United States, 338 U.S. 160; 93 L.Ed. 1879; 69 S.Ct. 1302; Carroll v. United States 267 U.S. 132, 69 L.Ed. 543, 45 S. Ct. 280.

The fact that an individual was in a particularized crime area and possibly engaged in a crime for which the area is known when the furtive movement is noticed by the officer has been held to establish probable cause. United States v. Magda (CA 2 1976); United States v. Davis, 458 F. 2d 819 (CA DC 1972); United States v. Salter, 521 F. 2d 1326 (CA 2 1975), People v. Oden, 36 N.Y. 2d 382 (1974); United States v. Santana, 485 F 2d at 368 (CA 2 1973); McLeod v. State, 450 S.W. 2d 321, Tex. Crim. App. (1970); Lerma v. State, 491 S.W. 2d 152, Tex. Crim. App. (1973).

Officer Hollingshead related several different facts which could establish probable cause based on the above enunciated principles:

(1.) his knowledge of the Blue Room as a narcotic hangout, where several arrests for narcotics had been made;

(2.) the observation of *abnormal* activity in front of the Blue Room wherein people were exchanging money for some type of object;

(3.) the smell of marijuana when he approached the Petitioner;

(4.) the Petitioner's exclamation toward the officer when he saw him and the rapid movement of the Petitioner in

attempting to swallow some object which he quickly placed in his mouth.

All of these factors could certainly lead a trained investigator to reasonably believe the Petitioner was in possession of illegal drugs which he was trying to destroy.

There is, thusly, no merit in the contention that unnecessary force was utilized to seize the evidence or that no probable cause existed for the seizure.

CONCLUSION

For the reasons advance above, the Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on this ___ day of _____, 1978, one (1) copy of the Petition for Writ of Certiorari was mailed, postage prepaid, to Bennie Bock, II, Counsel for the Petitioner, 340 North Seguin, New Braunfels, Texas, 78130. I further certify that all parties required to be served have been served.

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APPENDIX "A"

DOUGLAS SEIDEL,
Appellant

NO. 55,936 v. --Appeal from COMAL County

THE STATE OF TEXAS,
Appellee

OPINION

This is an appeal from a conviction for the possession of lysergic acid diethylamide; the punishment is imprisonment for 2 years, probated.

The appellant asserts that: (1) the court erred in overruling a pretrial motion to suppress and in admitting evidence which was unlawfully obtained in violation of his constitutional rights; (2) the court erred in admitting in evidence the "alleged substance" because a proper chain of custody was not shown; and (3) "... the evidence was insufficient to prove the knowledge and conjunctive intent of the appellant with the alleged offense."

On the hearing of the motion to suppress and during the trial before the court Detective Steven Hollingshead, a New Braunfels city police officer, testified concerning the obtaining of lysergic acid diethylamide from the appellant. Hollingshead observed unusual activity of people standing in front of the Blue Room, a lounge in New Braunfels. He saw a Latin-American male appearing to exchange something for money near the door. Hollingshead knew that in the past several arrests relating to narcotics offenses had been made at the Blue Room and that that establishment had a reputation among law enforcement officers for being a place where there was traffic in

drugs. Hollingshead maintained a surveillance with binoculars for a few minutes and came to the conclusion that drugs were being exchanged for money by the people in front of the Blue Room. He saw people making furtive gestures and appearing to get something from the Latin-American male who received money from them. Hollingshead, who was not in uniform, called for help and then walked toward the group in front of the Blue Room. As Hollingshead came toward the group he noticed the strong smell of marihuana. The appellant was watching a police sergeant who was also approaching the group. Hollingshead identified himself to the appellant as a police officer. The appellant used foul language towards Hollinshead, rapidly placed something in his mouth, attempted to swallow it, and jumped back toward the building. Hollingshead grabbed the appellant by the throat and with the help of Sergeant Domingo Herrera Hollingshead took from the appellant's mouth a small piece of paper which had a blue dot on it. Hollingshead placed his initials and the date on the small piece of paper and later placed it in an envelope which he marked, dated, and sealed.

Hollingshead gave the envelope to Officer James Pugh. Pugh testified that he received the envelope from Hollingshead and delivered it to the Department of Public Safety Crime Laboratory in Austin. At the trial Hollingshead identified the small piece of paper as the one he took from the appellant and also identified the envelope in which he had placed the paper. Glen Harrison, a chemist for the Department of Public Safety, identified the envelope that Hollingshead and Pugh had also identified; Harrison said he saw Pugh deliver the envelope to George Taft, another chemist for the Department of Public Safety. Chemist Harrison's chemical analysis revealed that the paper with the blue dot contained lysergic acid diethylamide.

Officer Hollingshead had personal knowledge that arrests for narcotic offenses had been made at the Blue Room and he knew of the establishment's reputation for being a place where there was drug traffic. His experience as an officer led him to believe that the unusual activity which he had observed was evidence that traffic in drugs was being carried on at the time. As he approached to investigate, the actions of the appellant were sufficient to give the officer the right to obtain the evidence which it appeared the appellant was trying to destroy by swallowing. The force used to obtain the peice of paper from the appellant's mouth was not unreasonable. See Donely v. State, 435 S.W.2d 518 (Tex.Cr.Ap. 1969); Hernandez v. State, 548 S.W.2d 904 (Tex.Cr.App. 1977). The court did not err in overruling the motion to suppress and in admitting the evidence at trial. See McLeod v. State, 450 S.W.2d 321 (Tex.Cr.App. 1970).

The chemist identified the small piece of paper from which he extracted lysergic acid diethylamide. The same piece of paper was identified by Hollingshead as the one he had taken from the appellant, dated and initialed. This, with the other evidence which has already been summarized, is proof of the proper chain of custody, and the evidence was properly admitted. There was no trial objection that a proper chain of custody had not been proved. This ground of error is overruled. See Salinas v. State, 542 S.W.2d 864 (Tex.Cr.App. 1976); Hicks v. State, 545 S.W.2d 805 (Tex.Cr.App. 1977); Salinas v. State, 507 S.W.2d 730 (Tex.Cr.App. 1974).

The evidence summarized shows the appellant possessed the small piece of paper and that he was attempting to destroy such evidence when he saw the police sergeant approaching and when he was informed that Hollingshead was a police officer. The evidence is sufficient to establish that the appellant knowingly and intentionally possessed the lysergic acid diethylamide.

A docket entry and the transcription of the court reporter's notes show that the appellant entered a plea of not guilty before the court. The judgment and the judgment nunc pro tunc both erroneously recite that the appellant entered a plea of guilty. The judgment is ordered corrected and reformed to show the appellant entered a plea of not guilty.

The judgment, as reformed, is affirmed.

PER CURIAM

(Delivered November 2, 1977)